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CONSTRUCTION CONSENSUS PROCUREMENT IMPROVEMENT ACT OF 2016

JULY 14, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 5199]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 5199) to amend title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, and to prohibit the use of reverse auctions for design and construction services procurements, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

In section 3, in the matter proposed to be inserted by subsection (a)(1), strike "$750,000" each place it appears (including any headings) and insert "$3,000,000".

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 5199, the Construction Consensus Procurement Improvement Act of 2016, was introduced to encourage competition and reduce the costs of bidding for federal construction contracts. The bill encourages the use of the two-step bid and proposal process for design-build construction contracts in order to reduce the costs of competing in the government marketplace, and reduce the time contracting officers must spend reviewing numerous complicated design proposals in the one-step process.

BACKGROUND AND NEED FOR LEGISLATION

The federal government spent $439 billion in fiscal year (FY) 2015 on contracts for goods and services. Approximately $21.4 billion (or five percent) of this amount was spent on federal construction and architect and engineering (A&E) projects. Small business prime contractors received approximately $7.4 billion (or 35 percent) of this spending.[1] Construction contracting would benefit from a streamlining of the procurement process to ensure robust small business participation on design-build proposal teams.

Typically, the federal government uses one of two processes for buying construction and A&E services. First, under the "design-bid-build" process, design and construction are treated as two separate requirements and contracts are awarded sequentially and separately. Under the second "design-build" process design and construction are combined into a single requirement with a single contract awarded to one company (which is often a team) responsible for both the design and construction.[2]

There are two source selection processes for design-build contracts.[3] There is the single-step design-build selection process where all construction and design teams must submit detailed and costly full proposals up front. The procuring agency then evaluates all proposals and selects an awardee. There is also a two-phase design-build selection process.[4] Under this process, teams submit information related to experience and past performance in phase one. The procuring agency then selects a limited number of the most qualified offerors (generally three to five) to advance to phase two of the competition. During phase two, these offerors submit detailed price and technical proposals that the procuring agency evaluates in order to make an award decision.

Encouraging the use of the two-step design-build process

There are recognized benefits to design-build contracting that include having a single accountable prime contractor. However, this process also requires highly complicated and often costly proposals.

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[1] Data source is the Federal Procurement Data Systems-Next Generation (FPDS-NG) available at: http://www.fpds.gov.

[2] 41 U.S.C. § 3309.

[3] The federal government has used this design-build method since the late 1980s and early 1990s. Ralph C. Nash & John Cibinic, *Design-Build Contracting: Can the Federal Government Use This Technique Effectively?* No. 12 Nash & Cibinic Rep. 68 (1994).

[4] 48 C.F.R. § 36.303.

Experts have said that in order to develop accurate construction cost proposals, bidders must complete up to 80 percent of the design work and determine detailed space and material needs.[5] Current law encourages the use of a two-step process for design-build contracts and the selection of no more than two to five firms for phase two in order to encourage selection of the most qualified firms and limit the cost burden of these types of proposals.[6]

However, concerns have been expressed that agencies awarding construction contracts (typically the General Services Administration (GSA) and the U.S. Army Corps of Engineers (USACE)) are overly reliant on one-step design-build contractors. In addition, when the two-step process is used there are concerns that these agencies may be allowing too many offerors into phase two.[7]

While the one-step process can offer the advantage of speed to the government, it can also be more expensive, burdensome and time-consuming for potential contractors, who must make a significant investment in proposal costs with limited chances of being awarded the contract. This can discourage firms from competing.

A 2012 survey by the American Institute of Architects found that between 2007 and 2011, architecture firms spent a median of $260,000 for each design-build project, which is a significant investment, particularly for small businesses.[8] Under the two-step process, there is a lower initial cost because bidders' proposals are focused on demonstrating experience and past performance qualifications. Then, as the number of potential bidders decreases in phase two, bidders have a greater chance of winning the award and therefore a greater return on investment from their cost proposals. The advantages of the two-step process are limited though when over five bidders advance to phase two.

This bill will encourage the use of the two-step process for construction procurements. The two-step design-build process can help to ensure that the most qualified bidders are selected for phase two and that those firms have a greater incentive to submit a competitive proposal because they will have a greater chance of winning the award. Encouraging the use of the two-step process for design and construction services will reduce the costs of competing in the government marketplace and reduce the time contracting officers must spend reviewing numerous complicated design proposals.

Prohibiting the use of reverse auctions for design and construction services

The term "reverse auction" is not defined in statute. However, the Office of Management and Budget (OMB) has released guid-

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[5] *Assessing Government's Use of Design-Build Contracts: Hearing before the Subcomm. on Federal Workforce, US Postal Service and the Census of the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013) (statement of Charles D. Dalluge on behalf of the American Institute of Architects).

[6] 41 U.S.C. § 3309(d).

[7] *Assessing Government's Use of Design-Build Contracts: Hearing before the Subcomm. on Federal Workforce, US Postal Service and the Census of the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013) (statement of Charles D. Dalluge on behalf of the American Institute of Architects); The Hill, *A Better Way to Build More Efficient Government* by Helen Combs Dreiling (Oct. 4, 2014).

[8] *Assessing Government's Use of Design-Build Contracts: Hearing before the Subcomm. on Federal Workforce, US Postal Service and the Census of the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013) (statement of Charles D. Dalluge on behalf of the American Institute of Architects).

ance on how to effectively use the reverse auctions.[9] Reverse auctions provide a method for bidding down prices and is a particularly useful tool for the purchase of commodities. However, the reverse auction tool may not be appropriate for the procurement of complicated design and construction services.

The USACE conducted a year-long study of reverse auctions for construction services and found that it did not deliver the promised savings in construction contracts. Specifically, the USACE found that using reverse auctions for construction projects did not provide "any significant or even marginal edge in savings" and that construction was too variable a service to be considered a commodity.[10]

This bill prohibits the use of reverse auctions as part of the two-phase process for construction and design services.

LEGISLATIVE HISTORY

H.R. 5199, the Construction Consensus Procurement Improvement Act of 2016, was introduced on May 11, 2016 by Congressman Mark Meadows (R–NC) and referred to the Committee on Oversight and Government Reform.

A companion bill, S. 1526, the Construction Consensus Procurement Improvement Act of 2015, was introduced by Senator Portman on June 8, 2015. On February 10, 2016, the Senate Homeland Security and Governmental Affairs Committee ordered the bill, as amended, favorably reported.

Two other related House bills were introduced in 2015, including H.R. 1666, the Design-Build Efficiency and Jobs Act of 2015, and H.R. 838, the Security in Bonding Act of 2015.

On December 12, 2014, in the 113th Congress, the House Oversight and Government Reform Committee reported H.R. 2750, the Design-Build Efficiency and Jobs Act of 2014.[11] H.R. 2750 would have required a two-phase selection process for the award of civilian and defense design and construction contracts having a value of greater than $1.5 million, but did not include language on reverse auctions.

SECTION-BY-SECTION

Section 1. Short title; table of contents

Designates the bill as the "Construction Consensus Procurement Improvement Act of 2016."

Section 2. Congressional findings

Makes six findings: (1) acquisition procedures that are often used effectively to procure productions and other forms of services are not always appropriate for procurement of design and construction services; (2) federal procurement officials often adopt contracting techniques from the private sector and have used those techniques effectively to procure products and services; (3) design-build is a procurement technique federal officials have adopted from the private sector that has worked well for procurement of design and

[9] OMB Memorandum on *Effective Use of Reverse Auctions* from Office of Federal Procurement Administrator Anne E. Rung Memorandum for Chief Acquisition Officers and Senior Procurement Executives (June 1, 2015).

[10] USACE, Final Report Regarding the USACE Pilot Program on Reverse Auctioning 11 (2004).

[11] House Report 113–668 (Dec. 12, 2014).

construction services; (4) the current statutory framework for design-build could benefit from legislative refinement; (5) reverse auctions are another procurement technique federal officials have adopted from the private sector and used successfully to award contracts for the purchase of products that are commercially equivalent to commodities; and (6) despite their success in other contexts, reverse auctions are generally inappropriate for procurement of design and construction services, given the unique nature of each such project.

Section 3. Design-build construction process improvement

For civilian contracts for design and construction of a public building, facility or work, the bill would require two-phase selection procedures be used for contracts with a value of $750,000 or greater.

For such contracts valued at less than $750,000, the bill would require the contracting officer to make a determination on whether to use two-phase selection procedures based on consideration of several factors. The contracting officer would be required to consider the following factors: (1) whether the contracting officer anticipates three or more offers will be received; (2) design work must be performed before an offeror can develop a price or cost proposal; (3) whether the offeror will incur a substantial amount of expense in preparing the offer; and (4) other information including the: (i) extent to which the project requirements have been adequately defined; (ii) time constraints for delivery of the project; (iii) capability and experience of potential customers; (iv) suitability of the project for use of the two-phase selection procedures; (v) capability of the agency to manage the two-phase selection process; and (vi) other agency-established criteria.

Requires annual agency reports on each instance by which the agency awarded a design-build contract in which more than five finalists were selected for phase-two requests for proposals or the contract was awarded without using two-phase selection procedures. OMB would be required to make the agency reports publicly available.

Requires the Government Accountability Office to analyze agency compliance with the requirements of this bill on design-build contracts.

Section 4. Prohibition on the use of a reverse auction for the award of a contract for design and construction services

States a finding that reverse auctions bid down the price compared to traditional auctions where buyers bid up on the price.

Requires the Federal Acquisition Regulatory Council in consultation with the Administrator for Federal Procurement Policy to amend the Federal Acquisition Regulation to prohibit the use of reverse auctions as part of the two-phase selection procedure for awarding contracts for construction and design services.

Defines "design and construction services" as site planning and landscape design, architectural and engineering services (including surveying and mapping), interior design, performance of substantial construction work for facility, infrastructure, and environmental restoration projects, delivery and supply of construction ma-

terials to construction sites, or construction or substantial alteration of public buildings or public works.

Defines "reverse auction" as a real-time auction conducted through an electronic medium among two or more offerors who compete by submitting bids for a supply or service contract with the ability to submit revised lower bids at any time before the closing of the auction; and the award of the contract, delivery order, task order, or purchase order to the offeror in whole or in part, based on the price obtained through the auction process.

EXPLANATION OF AMENDMENTS

During Full Committee consideration of the bill, Ranking Member Elijah Cummings (D–MD) offered an amendment on behalf of Congressman Stephen Lynch (D–MA) that would raise the contract value threshold from $750,000 to $3 million on the requirement to use the two-phase selection procedure for design and construction contracts. The amendment was adopted by voice vote.

COMMITTEE CONSIDERATION

On May 17, 2016, the Committee met in open session and ordered reported favorably the bill, H.R. 5199, as amended, by voice vote, a quorum being present.

ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of H.R. 5199.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill makes amendments to improve competition in the area of federal construction contracting. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives of the bill are to improve the manner in which Federal contracts for construction and design services are awarded, and to prohibit the use of reverse auctions for design and construction services procurements.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the report include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

JUNE 13, 2016.

Hon. JASON CHAFFETZ,
Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5199, the Construction Consensus Procurement Improvement Act of 2016.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 5199—Construction Consensus Procurement Improvement Act of 2016

H.R. 5199 would modify the federal government's procedures for awarding design and construction contracts for federal facilities and would prohibit the use of reverse auctions for such awards. Specifically, the legislation would require a two-phase selection process for designing and constructing any federal facility with a cost of more than $3 million. In phase one, firms would provide basic information on their experience and past performance; agencies then would select a few firms and invite them to submit a more detailed proposal in phase two.

CBO reviewed information on the process of awarding construction contracts by the Army Corps of Engineers (Corps) and the General Services Administration (GSA), two agencies that oversee construction of many federal facilities. Those agencies often use a two-phase process to select firms for construction projects but also use other acquisition strategies to award contracts. On the basis of information from those agencies, CBO estimates that implementing H.R. 5199 would cost $3 million over the 2017–2021 period—about $600,000 a year—because agencies that currently evaluate projects using a one-phase process would incur somewhat higher costs to evaluate two rounds of proposals before selecting a firm for each construction project.

CBO also reviewed information on the use of reverse auctions in government procurement contracts by the Corps and GSA. Those agencies have found that using reverse auctions in complex procurements does not consistently result in lower procurement costs than would result from other methods such as sealed bids or negotiated procurements. Those agencies generally do not use reverse auctions to obtain such services. On that basis, CBO estimates that implementing H.R. 5199 would not result in a significant change in the government's bidding practices and thus would not have a significant effect on the federal budget.

Because enacting the bill could affect direct spending by agencies not funded through annual appropriations, pay-as-you-go procedures apply. CBO estimates, however, that any net change in spending by those agencies would be negligible. Enacting the bill would not affect revenues. CBO estimates that enacting H.R. 5199 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 5199 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On March 29, 2016, CBO transmitted a cost estimate for S. 1526, the Construction Consensus Procurement Improvement Act of 2015, as ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on February 10, 2016. S. 1526 and H.R. 5199 are similar, although H.R. 5199 would require agencies to use a two-phase selection process for the design and construction of facilities with a cost greater than $3 million. S. 1526 which would impose the process for facilities with a cost greater than $750,000. CBO estimates that the process imposed in H.R. 5199 would be less costly.

The CBO staff contacts for this estimate are Matthew Pickford and Aurora Swanson. This estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 41, UNITED STATES CODE

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SUBTITLE I—FEDERAL PROCUREMENT POLICY

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CHAPTER 33—PLANNING AND SOLICITATION

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§ 3309. Design-build selection procedures

(a) AUTHORIZATION.—Unless the traditional acquisition approach of design-bid-build established under sections 1101 to 1104 of title 40 or another acquisition procedure authorized by law is used, the head of an executive agency shall use the two-phase selection procedures authorized in this section for entering into a contract for the design and construction of a public building, facility, or work when a determination is made under subsection (b) that the procedures are appropriate for use.

[(b) CRITERIA FOR USE.—A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when—

[(1) the contracting officer anticipates that 3 or more offers will be received for the contract;

[(2) design work must be performed before an offeror can develop a price or cost proposal for the contract;

[(3) the offeror will incur a substantial amount of expense in preparing the offer; and

[(4) the contracting officer has considered information such as the following:

[(A) The extent to which the project requirements have been adequately defined.

[(B) The time constraints for delivery of the project.

[(C) The capability and experience of potential contractors.

[(D) The suitability of the project for use of the two-phase selection procedures.

[(E) The capability of the agency to manage the two-phase selection process.

[(F) Other criteria established by the agency.]

(b) CRITERIA FOR USE.—

(1) CONTRACTS WITH A VALUE OF AT LEAST $3,000,000.—Two-phase selection procedures shall be used for entering into a contract for the design and construction of a public building, facility, or work when a contracting officer determines that the project has a value of $3,000,000 or greater, as adjusted for inflation in accordance with section 1908 of this title.

(2) CONTRACTS WITH A VALUE LESS THAN $3,000,000.—For projects that a contracting officer determines have a value of less than $3,000,000, the contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when—

(A) the contracting officer anticipates that 3 or more offers will be received for the contract;

(B) design work must be performed before an offeror can develop a price or cost proposal for the contract;

(C) the offeror will incur a substantial amount of expense in preparing the offer; and

(D) the contracting officer has considered information such as—

(i) the extent to which the project requirements have been adequately defined;

(ii) the time constraints for delivery of the project;

(iii) the capability and experience of potential contractors;

(iv) the suitability of the project for use of the two-phase selection procedures;

(v) the capability of the agency to manage the two-phase selection process; and

(vi) other criteria established by the agency.

(c) PROCEDURES DESCRIBED.—Two-phase selection procedures consist of the following:

(1) DEVELOPMENT OF SCOPE OF WORK STATEMENT.—The agency develops, either in-house or by contract, a scope of work statement for inclusion in the solicitation that defines the project and provides prospective offerors with sufficient information regarding the Federal Government's requirements (which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to submit proposals that meet the Federal Govern-

ment's needs. If the agency contracts for development of the scope of work statement, the agency shall contract for architectural and engineering services as defined by and in accordance with sections 1101 to 1104 of title 40.

(2) SOLICITATION OF PHASE-ONE PROPOSALS.—The contracting officer solicits phase-one proposals that—

(A) include information on the offeror's—

(i) technical approach; and

(ii) technical qualifications; and

(B) do not include—

(i) detailed design information; or

(ii) cost or price information.

(3) EVALUATION FACTORS.—The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team), and other appropriate factors, except that cost-related or price-related evaluation factors are not permitted. Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals. The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

(4) SELECTION BY CONTRACTING OFFICER.—

(A) NUMBER OF OFFERORS SELECTED AND WHAT IS TO BE EVALUATED.—

(i) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work, or both; and

(ii) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with subsections (b) to (d) of section 3306 of this title.

(B) SEPARATE EVALUATIONS.—The contracting officer separately evaluates the submissions described in clauses (i) and (ii) of subparagraph (A).

(5) AWARDING OF CONTRACT.—The agency awards the contract in accordance with chapter 37 of this title.

(d) SOLICITATION TO STATE NUMBER OF OFFERORS TO BE SELECTED FOR PHASE-TWO REQUESTS FOR COMPETITIVE PROPOSALS.—A solicitation issued pursuant to the procedures described in subsection (c) shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (c)(4). The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Federal Government's interest and is consistent with the purposes and objectives of the two-phase selection process.

(e) REQUIREMENT FOR GUIDANCE AND REGULATIONS.—The Federal Acquisition Regulation shall include guidance—

(1) regarding the factors that may be considered in determining whether the two-phase contracting procedures author-

ized by subsection (a) are appropriate for use in individual contracting situations;

(2) regarding the factors that may be used in selecting contractors; and

(3) providing for a uniform approach to be used Government-wide.

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